

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
DEC -1 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0190-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOSHUA AGUILERA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20020588

Honorable Teresa Godoy, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Joshua Aguilera

Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Pursuant to a 2002 plea agreement, petitioner Joshua Aguilera was convicted of sexual assault of a minor under fifteen years of age, a class three felony and a dangerous crime against children. The trial court placed him on probation for twenty years. Aguilera twice admitted having violated the conditions of his probation, once in 2003, after which the court continued him on probation, and again in 2004. After the second violation, the court revoked his probation and sentenced him to a presumptive, ten-year term of imprisonment with credit for 306 days served. Aguilera then filed his first petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting that the court had considered improper sentencing factors. The court denied his petition in a February 2005 ruling. More than three years later, Aguilera filed a pro se petition for post-conviction relief, ostensibly invoking Rule 32.1(e) and (g) to assert a new challenge to his sentence and a related claim of ineffective assistance of trial counsel. The trial court denied relief without conducting an evidentiary hearing, and this petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief unless the court has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no abuse here.

¶2 Aguilera asserts that his otherwise untimely petition for post-conviction relief, *see* Rule 32.4(a), is somehow timely because of his recent discovery of “relevant case law.” To the extent Aguilera contends the claims he asserts on review are based on newly discovered evidence or a significant change in the law pursuant to Rule 32.1(e) and (g),

theories he obliquely asserted in his petition below, the trial court properly rejected any such claims on those grounds, thus rendering his arguments precluded and untimely.

¶3 Aguilera argues that he was improperly sentenced pursuant to A.R.S. § 13-604.01,¹ a special sentencing statute for dangerous crimes against children, claiming the preparatory offense of which he was convicted is not defined in the statute. Apparently asserting, as he did below, that this court's opinion in *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007), constituted newly discovered evidence or a significant change in the law, Aguilera argues that § 13-604.01 does not apply to preparatory dangerous crimes against children, thus rendering his sentence illegal. In *Gonzalez*, we concluded that, based on what appeared to be a legislative oversight, the relevant version of § 13-604.01 did not encompass attempted sexual conduct with a victim under the age of twelve. *Gonzalez*, 216 Ariz. 11, ¶¶ 8, 10, 162 P.3d at 652-53. However, as the trial court here noted, the victim in this matter was twelve years old at the time of the offense, a fact Aguilera apparently did not dispute below when the court, the prosecutor, his probation officer, and his own attorney repeatedly pointed this out. Therefore, the defect in the relevant version of § 13-604.01, which applied only to victims under the age of twelve, simply does not apply to Aguilera. Nor has Aguilera stated a claim for relief based on Rule 32.1(e). Moreover, our supreme court recently held

¹Section 13-604.01 has been amended and renumbered as A.R.S. § 13-705, effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29, 120. We refer to the version of the statute in effect at the time of Aguilera's offense. *See* 2001 Ariz. Sess. Laws, ch. 334, § 7.

that *Gonzalez* was not a significant change in the law. *State v. Shrum*, 220 Ariz. 115, ¶¶ 19, 23, 203 P.3d 1175, 1179-80 (2009).

¶4 Accordingly, because Aguilera has not shown that his claim fell within any of the exceptions to preclusion provided by Rule 32.2(b), and because he could have raised it in his first petition, he is precluded from raising it now. *See* Ariz. R. Crim. P. 32.2(a)(3). Aguilera also claims the prosecutor misrepresented the applicability of § 13-604.01 in the plea agreement, a fact he asserts trial counsel should have recognized and raised when he pled guilty. Because both of these arguments necessarily relied on the success of Aguilera's claim regarding § 13-604.01, a claim the trial court correctly rejected, the court likewise correctly denied relief on these claims.

¶5 Although the petition for review is granted, relief is denied.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

GARYE A. VÁSQUEZ, Judge